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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID LEE STRONG, Defendant and Appellant.	B203882 (Los Angeles County Super. Ct. No. BA 319241)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Koppel, Judge. Affirmed, as modified.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant David Lee Strong was convicted by a jury of possessing cocaine base for sale. He admitted two prior convictions and two prior prison terms. The People chose not to proceed under one of the two prior convictions. Appellant was sentenced to the upper term of five years, doubled for one prior conviction, and to two additional years for the two prior prison terms for a total of 12 years. Four fines were also imposed. We affirm the conviction.

FACTS

Appellant limits his contentions on appeal to the denial of his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike the remaining prior conviction, to an error in the award of presentence credits and to the absence of a supplemental probation report. Accordingly, we state the circumstances of the offense only in summary form.

Appellant was detained by the police in the afternoon on March 20, 2007, near Seventh and San Julian Streets in Los Angeles, when they became suspicious of his behavior. A search of the defendant yielded $242.21 in currency, six plastic baggies of cocaine base, razor blades and a cell phone. During the search, appellant attempted to swallow an object. Appellant's defense was that the six baggies of cocaine base were in a sock that he found on the street shortly before the detention and arrest and that he was therefore ignorant of what was in the baggies.

DISCUSSION

1. The Court Did Not Err in Denying the Romero *Motion*

The prior conviction at issue is a 1979 California conviction for robbery.

Appellant was born in 1937. His first criminal conviction was in 1957. Since then his record reflects criminal activity in nearly every year up to 2007 with multiple criminal convictions; the only significant gap when he steered clear of crime is between 1985 and 1995. In all, appellant has six felony convictions, 13 misdemeanor convictions and 67 arrests. The sentencing memorandum submitted by the defense concedes that appellant "has an extensive history of law enforcement contacts," a concession that was reiterated

during the hearing on the motion, but contends that the prior convictions are primarily for theft and traffic offenses.

The trial court found no mitigating circumstances and that appellant has an "increasing criminal history." The court also stated that it had read the sentencing memorandum prepared by the defense.

On appeal, appellant contends that he stands convicted of a "non-violent drug offense, of a minor nature." Because the nature and circumstances of the current felony is one of the factors to be considered in a *Romero* motion (*People v. Williams* (1998) 17 Cal.4th 148, 161),[1] according to appellant this factor favors him. Again, appellant concedes in his brief that he has a lengthy criminal history but claims that since 1979 his offenses were misdemeanors, theft-related felonies and traffic offenses.

We do not agree that possession of narcotics for the purpose of sale is a minor offense. Narcotics are far too great a societal problem for this to be the case. We return to this point later. And we do not think that appellants *five* California burglary convictions between 1995 and 1999 can be minimized as "theft-related."

Appellant contends that although it is clear that the trial court read the defense's sentencing memorandum, the court did not read a report submitted by psychiatrist Mark E. Jaffe, M.D.

In September 2008, appellant moved to augment the record in this court with a copy of a report prepared by Dr. Jaffe. We granted that motion because counsel represented in the motion to augment that Dr. Jaffe's report was contained in the superior court file.

We have independently examined the superior court file. We find from that file that on July 20, 2007, defense counsel filed a motion for the appointment of a psychologist and that, on the same day, the court appointed Dr. Jaffe to examine

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[1] The others are the nature and circumstances of the defendant's prior serious and/or violent felony convictions and the particulars of the defendant's background, character, and prospects. (*People v. Williams, supra,* 17 Cal.4th at p. 161.)

appellant. Both the motion and the order of appointment were included in the envelope containing the probation report. We found no trace of Dr. Jaffe's report, which is dated August 29, 2007, in that envelope or in the superior court file.

The sentencing memorandum prepared by trial defense counsel bears the date of September 27, 2007. That memorandum makes no mention of Dr. Jaffe's report. It appears therefore that trial defense counsel made a deliberate decision not to submit Dr. Jaffe's report to the trial court. The decision appears to have been a wise one for, as we discuss immediately below, Dr. Jaffe's report is less than helpful to appellant's cause.

In light of the foregoing, we reject appellant's contention that the trial court erred in not reading Dr. Jaffe's report. The trial court could not have read it because it was not submitted to the court by the defense.

Based ostensibly on Dr. Jaffe's report, appellant claims in his opening brief that "appellant has a history of hearing voices and has been diagnosed with schizophrenia." This not what Dr. Jaffe's report states. To begin with, Dr. Jaffe's report notes repeatedly that appellant has a history of making false claims about his mental state in order to be moved to a different unit in the jail. *In the summary of clinical interview,* Dr. Jaffe states that appellant *told Dr. Jaffe* that he has a history of hearing voices and that he had been diagnosed with schizophrenia. In the "Clinical Impression" part of the report, Dr. Jaffe concluded that appellant exhibited no overt psychotic symptoms and that it appeared "that his primary problem is Antisocial Personality Disorder and he is deceitful." The final conclusion of the report is that appellant has no apparent mental illness that would prevent him from understanding legal proceedings or cooperating rationally in those proceedings. There are other less than complimentary comments about appellant in Dr. Jaffe's report that we find unnecessary to detail.

There are two points to be made about the subject of Dr. Jaffe's report.

First, trial defense counsel's decision not to submit this report to the trial court was eminently the correct decision to make. Putting it mildly, the report is singularly unhelpful to appellant's cause.

Second. We will assume for the benefit of appellate defense counsel, whose office is located in Oakland, that the representation that Dr. Jaffe's report was contained in the superior court file was an innocent mistake. All the same, it is a mistake that should not be repeated.[2]

Appellant contends "when a non-serious, non-violent felony is committed 29 years after the admitted strike by a defendant with a history of minor arrests and convictions, neither the defendant nor society is benefited by not striking the prior conviction." It is true that the felony was not violent. This said, none of the other assumptions in the foregoing statement is valid. Trafficking in cocaine base, i.e. trafficking in narcotics for profit, is a serious offense. It causes far too much damage and imposes far too great a burden on society not be called a serious offense. Remoteness of the prior is a factor only if the defendant has lived a crime-free life between then and the current conviction (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813), which is hardly true here. When, as here, the defendant continues his criminal career between the prior and the current offense, we agree with the court in *Humphrey* that remoteness of the prior is simply irrelevant. And some of appellant's prior convictions were for robbery, which does not reflect a "history of minor arrests and convictions." As far as benefit to society goes, removing appellant from the streets is a distinct plus.

We review the trial court's ruling on the *Romero* motion under an abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) The only factor that favors appellant is that the current offense was not violent. All other factors (see fn. 1 and accompanying text) militate against him. Under these circumstances, it is clear that the trial court did not abuse its discretion in denying the *Romero* motion.

Given that appellant could certainly have been dealt with as a three strikes offender, it appears that consideration has been given to the fact that the offense was not

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[2] In a letter dated June 18, 2009, appellate defense counsel informs us that she has "just learned that this document came from trial counsel."

violent and that it involved six baggies of rock cocaine and not a larger amount. In other words, these aspects of this case have been given due consideration.

2. The Court Did Not Err in Sentencing Appellant Without the Benefit of a Supplemental Probation Report

The probation report was prepared on March 27, 2007. The court ordered a supplemental probation report on June 22, 2007, the day that the jury's verdict was returned. The court renewed the order for a supplemental probation report on July 12, 2007, but no such report was ever received. Thus, when appellant was sentenced on September 27, 2007, the only probation report the court had received was the original report dated March 27, 2007.

Appellant contends that the probation report of March 27, 2007, was "clearly inadequate for the [trial] judge's needs" and that appellant had a right to the supplemental probation report.

This argument is made in the body of the argument that deals with the denial of the *Romero* motion. While there is a relationship between this argument and the *Romero* contention, it is clearly distinct from the *Romero* issue. A brief must state "each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).) The purpose of this rule is obvious; it ensures that neither the opposing party nor the court omits to address the contention in question. The contention about the supplemental probation report should have been presented under its own heading.

"The court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." (Cal. Rules of Court, rule 4.411(c).) Given that at appellant's age, patterns of conduct and behavior cannot be expected to change dramatically, the time between March 27, 2007, and sentencing on September 27, 2007, is not significant. It is also true that appellant was not eligible for probation (Pen. Code, § 1170.12, subd. (a)(2)), which is another circumstance that renders a supplementary probation report superfluous. (*People v. Llamas* (1998) 67 Cal.App.4th 35, 39-40.) Perhaps most

importantly, it is clear that the trial judge's decisions about sentencing were based primarily on appellant's lengthy criminal record. A supplemental probation report would therefore not have affected these decisions.

In light of the foregoing, we reject appellant's argument that the trial court did not "consider key documents" and that the court therefore abused its discretion. The court could hardly consider a psychiatric report that was not produced by the defense. While it would have been preferable if the supplemental probation report had been received at the time of sentencing, a supplemental probation report was not required. Importantly, it would not have made a difference as it would not have shed more light on appellant's background and history that is the pivotal point on which the sentencing decisions were based.

Appellant received 273 days credit for time served. Respondent concedes that he is entitled to 288 days of credit.

DISPOSITION

The judgment is modified to reflect that appellant is to receive 288 days credit for time served. In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment that reflects the correct award of credit for time served.

FLIER, J.

We concur:

RUBIN, Acting P. J.

BAUER, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.